

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CHAD CURRIN	:	
for Redetermination of Deficiencies or for Refund of	:	DETERMINATION
New York State Personal Income Tax under Article 22	:	DTA NO. 818387
of the Tax Law for the Period January 1, 1995 through	:	
September 30, 1996.	:	

Petitioner, Chad Currin, 1044 Parkwood Boulevard, Schenectady, New York 12308, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the period January 1, 1995 through September 30, 1996.

A small claims hearing was held before Allen Caplowaith, Presiding Officer, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on December 6, 2001 at 1:15 P.M. Petitioner, Chad Currin, appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Frances Leo).

Since neither party elected to reserve time to file a brief, the three-month period for issuance of this determination began as of the date the hearing was held.

ISSUE

Whether the penalty asserted against petitioner under Tax Law § 685(g), as a person who willfully failed to collect, truthfully account for and pay over the New York State withholding taxes due from P T Barnum's Magical Emporium, Inc. for the audit period, was proper.

FINDINGS OF FACT

1. According to the Division of Taxation (“Division”), P T Barnum’s Magical Emporium, Inc. failed to pay over the New York State personal income taxes withheld from the wages of its employees for the periods and in the amounts as follows:

<u>Period Ended</u>	<u>Amount</u>
9/30/95	\$29.96
12/31/95	64.20
3/31/96	113.62
6/30/96	249.02
9/30/96	<u>265.70</u>
Total tax not paid over	\$722.50

With the exception of three 1996 weekly payroll periods where the Division estimated the amount of withholding tax based on those records available, the unpaid withholding tax amounts were determined from the corporation’s payroll records provided by Chad Currin (hereinafter “petitioner”) .

2. On June 14, 1999, the Division issued a Statement of Proposed Audit Adjustments to P T Barnum’s Magical Emporium, Inc. (“P T Barnum”) asserting total tax due for the periods stated above of \$722.50, plus penalty of \$1,236.02 and interest of \$211.43, for a total amount due of \$2,169.95.

3. The Division then submitted a Withholding Tax Responsible Person Questionnaire to petitioner for his completion. Subsequently, petitioner returned the completed questionnaire. Review of petitioner’s answers and other entries thereon show that, with respect to P T Barnum:

a- He was president.

b- He was a person responsible for preparing or supervising the preparation of withholding tax returns and ensuring the remittance of tax.

c- He was a person who participated in the decision-making process in regard to significant business decisions.

d- He was a person responsible for maintaining and managing the business.

e- He owned corporate stock and derived substantial income from the business or had a substantial economic stake in the business.

f- He had the authority to pay or direct payments of creditors, sign checks, hire and fire employees and negotiate loans, borrow money for the business or guarantee business loans.

4. On October 12, 1999, the Division issued two notices of deficiency against petitioner wherein penalties were asserted pursuant to Tax Law § 685(g). The total amount asserted in the two deficiencies was equal to the total New York State withholding taxes determined to be due from P T Barnum of \$722.50. These deficiencies were asserted against petitioner on the basis that he was a person responsible for the withholding and payment of the unpaid New York State withholding taxes of P T Barnum for the periods at issue, and that he failed to do so.

5. Subsequently, petitioner filed a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services. As the result of the conference held June 27, 2000, the conferee issued a Conciliation Order to petitioner on December 8, 2000 which denied his request and sustained the notices of deficiency.

6. On March 7, 2001, petitioner filed a petition with the Division of Tax Appeals wherein he alleged that the Division erred in determining the following:

That I was guilty of failing to file or pay said taxes; and

That I was responsible for said taxes without a case or any proof a judgement has been made. Since 2 years ago when this process started dozens of people have made an equal number of different claims. No two people at the Tax Dept. ever say the same thing.

In said petition, he also asserted that:

I have been harassed , threatened and abused, not to mention the hours I have put into defending myself and my personal property and credit report from being maligned fraudulently.

7. P T Barnum was engaged in the business activity of selling magic tricks and practical jokes. In the rear of its premises it organized and held birthday parties.

8. P T Barnum registered for New York State sales tax purposes on February 28, 1995. The hearing record is unclear as to when P T Barnum was incorporated. According to petitioner, it was incorporated on December 1, 1995. However, according to the audit work file, it was incorporated on October 1, 1995.

9. The hearing record contains a Bulk Sales Affidavit which was signed October 3, 1996 by petitioner, as president of P T Barnum, as well as by petitioner, individually. According to this affidavit, which details the sale of the assets of P T Barnum, petitioner was the sole owner and stockholder.

SUMMARY OF PETITIONER'S POSITION

10. During the hearing, petitioner's position in this matter was threefold. He initially contended that the withholding taxes determined to be due from P T Barnum were paid. He argued that all payments were made by Fleet Bank through a "Tax Prep" account he maintained with Fleet. No documentation was submitted in support of this argument. Secondly, petitioner alleged that during the periods at issue, P T Barnum had three additional officers; one David Katz, Mr. Katz's wife and petitioner's wife. Petitioner argued that Mr. Katz was chief executive officer and as such, he should also be held as a responsible person. No documentation was submitted in support of this argument either. Lastly, petitioner argued that the burden of proof should properly be on the Division in this proceeding.

CONCLUSIONS OF LAW

A. With respect to the burden of proof, Tax Law § 689(e) provides as follows:

In any case before the tax commission under this article, the burden of proof shall be upon the petitioner except for the following issues, as to which the burden of proof shall be upon the tax commission:

(1) whether the petitioner has been guilty of fraud with intent to evade tax;

(2) whether the petitioner is liable as the transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax;

(3) whether the petitioner is liable for any increase in a deficiency where such increase is asserted initially after a notice of deficiency was mailed and a petition under this section filed

B. With regard to the withholding tax penalty asserted against petitioner, Tax Law § 685(g)

provides:

Willful failure to collect or pay over tax.--Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payments thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

C. Tax Law § 685(n), in turn, furnishes the following definition of “persons” subject to the section 685(g) penalty:

[T]he term person includes an individual, corporation, partnership or limited liability company or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, or a member, manager or employee of a limited liability company, who as such officer, employee, manager or member is under a duty to perform the act in respect of which the violation occurs.

D. The record is clear in this matter that petitioner was a person responsible for truthfully accounting for the New York State income taxes withheld from the employees of P T Barnum

during the periods at issue and paying over such taxes to the State. Since he failed to meet this obligation, he is properly subject to the penalty asserted under Tax Law § 685(g).

E. The petition of Chad Currin is denied and the two notices of deficiency issued against him on October 12, 1999 are sustained.

DATED: Troy, New York
February 28, 2002

/s/ Allen Caplowaith
PRESIDING OFFICER